

Federal Circuit explicitly awarded Checkpoint costs for its first appeal and never held that such costs should be excluded.

I. DEFENDANTS FAIL TO PRESENT ANY BASIS TO RECONSIDER THE COURT’S AUGUST 7, 2018 ORDER.

Defendants present no grounds to reconsider the Court’s August 7, 2018 Order. They raise no intervening change in the controlling law and no new evidence that was not available when the Court granted the motion. Nor do Defendants present any need to correct a clear error of law or fact or to prevent manifest injustice.

Defendants’ motion to reconsider merely repeats the arguments they previously made *ad nauseum* to both this Court and the Federal Circuit. A motion to reconsider is not intended to simply rehash an argument that Defendants previously made. *Taksir v. Vanguard Grp., Inc.*, 273 F. Supp. 3d 559, 544 (E.D. Pa. 2017). Nor is it permitted “simply to allow Defendants a ‘second bite at the apple.’” *Id.* Here, Defendants made the exact same argument they make now—that Checkpoint is not entitled to costs for its first appeal—in their:

- (1) July 3, 2017 Objections to Checkpoint’s Second Bill of Costs [Dkt. 383];
- (2) July 6, 2017 Objections to Checkpoint’s Bill of Costs in the Federal Circuit [Fed. Cir. 16-1397, Dkt. 61];
- (3) July 6, 2017 Motion for Miscellaneous Relief Requesting that the Court Deny Costs in the Federal Circuit [Fed. Cir. 16-1397, Dkt. 62].
- (4) February 12, 2018 Opposition to Checkpoint’s Motion to Lift Stay and Tax Costs [Dkt. 390]; and,
- (5) April 12, 2018 Opposition to Checkpoint’s Motion to Lift Stay and Tax Costs [Dkt. 394].

Simply arguing that the Court “appears to have overlooked” an argument that Defendants have already made *five times* is not grounds for reconsideration.¹

II. CHECKPOINT IS ENTITLED TO COSTS FOR ITS FIRST APPEAL.

Defendants’ argument that Checkpoint is not entitled to costs for its first appeal to the Federal Circuit must be rejected.

First, Defendants already raised this argument in the Federal Circuit and the Federal Circuit rejected it. Defendants’ motion for “miscellaneous relief” argued that Checkpoint’s Bill of Costs in the District Court includes “premiums for a supersedeas bond pending this appeal and \$118,506.00 in costs for the supersedeas bond in the first appeal to this Court on the attorney fees award.” Ex. A [Fed. Cir. 16-1397, Dkt. 62] ¶¶ 4, 6, 8, 12 (emphasis in original.) The Federal Circuit denied Defendants’ motion and did not hold that the bond premiums Checkpoint paid in the prior appeal should be excluded from Checkpoint’s taxable costs. To the contrary, the Federal Circuit held that “[o]n the record and in accordance with the Rules, Checkpoint is entitled to include in its taxable costs the premiums paid for the bond.” Ex. B [Fed. Cir. 16-1397, Dkt. 65].

Second, Defendants’ argument is not supported by the facts. On November 2, 2011, this Court entered judgment against Checkpoint for \$6,583,719.98. [Dkt. 314.] Checkpoint moved to stay execution on the judgment and preserve its rights by posting a supersedeas bond, which this Court accepted and approved. [Dkt. 315, 321.] On March 25, 2013, the Federal Circuit reversed the judgment in its entirety. [Dkt. 324.] Pursuant to Federal Rule of Appellate Procedure 39(a)(3), “if a judgment is reversed, costs are taxed against the appellee.” In

¹ Defendants also argue “in the alternative” that the Court “misapplied the law in granting such costs.” [Dkt. 398-1, p. 3.] Defendants, however, present no case law to support their argument and thus it must be summarily rejected.

accordance with Fed. R. App. P. 39(a)(3), the Federal Circuit remanded to this Court “for taxation of costs for district court proceedings.” Ex. C [Fed. Cir. 12-1085, Dkt. 70].

Defendants’ argument that the Supreme Court subsequently granted Defendants’ petition for writ of certiorari in the first appeal is inconsequential. The Supreme Court remanded to the Federal Circuit for determination under the new standard enunciated under *Octane Fitness* and *Highmark*, and the Federal Circuit remanded back to this Court. Once the issue was back before the Federal Circuit, the Federal Circuit once again vacated the judgment. Neither the Supreme Court nor the Federal Circuit ever reinstated the original vacated judgment for which Checkpoint posted a bond in its first appeal. Thus, unless Checkpoint posted a bond in accordance with Federal Rule of Civil Procedure 62(b), Defendants could, and would, have executed on this Court’s \$6.6 million judgment within 14 days. By posting the bond, Checkpoint stayed execution of the judgment and preserved its rights until the judgment was reversed on appeal.

Defendants’ argument that upon remand from the Supreme Court, the Federal Circuit remanded to this Court without taxing costs is likewise a red herring. Checkpoint does not seek any costs for that intermediary proceeding. The proceedings for which Checkpoint seeks its costs are as follows:

Case No.	Proceeding	Checkpoint Seeking Costs
Dist. Ct. No. 01-2223	Original District Court proceedings	No
Fed. Cir. No. 12-1085	Checkpoint’s first appeal to the Federal Circuit	Yes – Pursuant to the Federal Circuit’s Sept. 30, 2013 Order granting costs (Ex. C)
Sup. Ct. No. 13-788	Defendants’ appeal to the Supreme Court	No
Fed. Cir. No. 12-1085	Remand proceedings in the Federal Circuit	No
Dist. Ct. No. 01-2223	Remand proceedings in the District Court	No

Fed. Cir. No. 16-1397	Checkpoint's second appeal to the Federal Circuit	Yes – Pursuant to the Federal Circuit's Aug. 31, 2017 Order granting costs (Ex. B)
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Nothing in the Federal Circuit's remand order precludes Checkpoint from seeking the costs it was explicitly awarded in its first and second appeals to the Federal Circuit.

CONCLUSION

For the reasons stated above, Checkpoint Systems, Inc. respectfully requests that this Court deny Defendants' Motion for Partial Reconsideration of the Court's August 7, 2018 Order, and grant such other and further relief as justice may require.

Dated: August 28, 2018

Respectfully submitted,

/s/ Anand C. Mathew

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CERTIFICATE OF SERVICE

I, Anand C. Mathew, an attorney, certify that on August 28, 2018, I caused a true and correct copy of the foregoing to be served via email through the ECF system upon the following:

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